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Supreme Court of the United States

October Term, 1965

No. 1108

In the Matter of the Petition of KARINA T. CORPORATION as Owner of the Fishing Vessel KARINA T, in a Cause of Exoneration From and Limitation of Liability

BRIDGET BARRON, etc., *et al.*,

Claimants-Petitioners,

v.

KARINA T. CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIDGET BARRON, etc., *et al.*,

Claimants-Petitioners,

v.

KARINA T. CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Bridget Barron, and other claimants, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed the decree of the United States District Court for the District of New Jersey, entered in favor of the Respondent, on the trial of a petition for exoneration from and limitation of liability.

The Opinions of the Courts Below

The opinion, findings and conclusions of the United States District Court for the District of New Jersey by Judge Arthur S. Lane are printed in the appendix hereto (*infra,* 1a-26a), and are annexed to the record of the Court below (a14-47),* but are not reported being labeled "Not for Publication." The *per curiam* opinion of the Court of Appeals is printed in the appendix hereto (*infra,* 30a) and is reported in 354 F2d 239.

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was decided and entered on January 4, 1966, and is annexed to the record of the Court below. It affirmed the decree of exoneration entered in the District Court on December 31, 1964.

Respondent petitioned for exoneration from and limitation of liability pursuant to 46 USC 183-185; petitioners filed claims; the United States District Court had exclusive jurisdiction, 28 USC 1333; the cause is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 USC Sections 1254(1) and 2101(c).

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* Numerals following the letter "a" in parentheses refer to pages in Claimants-Appellants' appendix in the Court of Appeals and filed here.

Questions Presented

Where a fishing vessel not subject to Government inspection, is lost with her crew in a storm under unknown circumstances, and part of the vessel is washed ashore, inspected by the owner who abandons the wreckage without notice to claimants, waits more than five months to petition for exoneration from and limitation of liability, and in violation of 46 USC 185 and Supreme Court Admiralty Rule 51 does not surrender the wreckage and falsely swears that there was none, and claimants are deprived of an opportunity to inspect the wreckage, and the owner is in privity with the vessel's construction, her unseaworthiness and the conduct of her master, in a limitation of liability proceeding:

1. Did the District Court acquire jurisdiction and the right to deprive the claimants of a jury trial where the owner in violation of 46 USC 185 and Supreme Court Admiralty Rule 51 did not surrender the wreckage?

2. In a limitation proceeding is a different and lesser standard of proof of seaworthiness required of the owner of a vessel not subject to Government inspection?

3. May an owner in privity with the unseaworthiness of his vessel limit his liability when she is lost in a storm of "extraordinary intensity."?

4. Does a limitation proceeding impose on Jones Act wrongful death claimants greater proof of negligence and causation than in civil jury cases?

5. Did the District Court err in not considering the conduct of the vessel's captain in not heading for the safe port of New York in heed of storm warnings, the owner's privity thereto and in denying claimants' motion for a continuance on this issue?

Statutes and Rules Involved

The limitation of liability statutes, 46 USC 183(a), RS 4283(a), 46 USC 185, RS 4285, Supreme Court Admiralty Rule 51, 28 USC Rules.

Statement of the Case

The Karina T, an uninspected commercial fishing vessel of 81 gross tons (a234-235), with a master and crew of seven men, floundered off the New Jersey Coast in the storm of March 5-8, 1962, with the loss of all hands (a1-5). There were no witnesses to the disaster (b76[x]). Between March 16 and 26 Carl Tobiasen, respondent's president learned that the pilothouse and attachments of the Karina T (shown C5A, C5B, C8, C9[*]) were beached at Assateague, Virginia, he and his son inspected the wreckage (DT[o]2; 3 b21-22, 152-158; a94-95) but abandoned it without a survey (a98-100, 175-177).

More than five months later on September 7, 1962 respondent filed a petition for exoneration from and limitation

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[x] Numerals following the letter "b" in parentheses refer to pages in appellee's appendix in the Court of Appeals and filed here.

[*] The letter C identifies claimants' exhibits.

[o] The letters DT identifies the deposition of Carl Tobiasen, respondent's president.

of liability under 46 USC 183-189 alleging that the Karina T was seaworthy, that her loss was "due to Acts of God and Perils of the Sea" and "occurred without any fault on the part of the petitioner and without its privity or knowledge" (a i 1, 2). Neither the wreckage nor its value was surrendered as required by 46 USC 185 and Supreme Court Admiralty Rule 51. On September 10, 1962 respondent filed a false affidavit of no value to be surrendered alleging, "There was no salvage resulting" (a i 277, 278).

The widows of six crewman for themselves and children, as claimants, answered the petition alleging, the owner's negligence in failing to provide a seaworthy vessel and to put into port, claims for wrongful death under the Jones Act, 46 USC 688 and the Death on the High Seas Act, 46 USC 761-768, that the wreckage not having been surrendered, and no stipulation of value having been filed, respondent was not entitled to the benefit of the limitation acts and the right to deprive claimants of a jury trial (a6-13). On the same grounds in pre-trial proceedings in the District Court, not reported, claimants contested the jurisdiction of the Court and moved for dismissal of the proceeding; the motion was denied.

The District Court's finding that the wreckage "was of no value" (*infra*, 23a), was based on the trial testimony of the son of respondent's president who was not qualified as an expert and made only a casual inspection, given more than 2 years after it was abandoned (b21, 22). The District Court concluded that the owner was entitled to "exoneration from all fault" and that "the petition for limitation—although moot—is also fully supported" (*infra*, 26a).

Respondent began construction of the Karina T in 1954 by Frank Smith at Bena, Virginia (a138); he built her as he went along without plans, working drawings or specifications (a143, 144, 279), which is unsafe practice (a234, 235). She was not built to conform to a working drawing prepared by respondent's architect, compare C38 and C45; the architect went to Bena, Virginia a few times but there is no proof of what he did (a144-148). After the hull and deck houses were completed she was finished at Stowman's Yard (a139). Respondent did not call either the builder or architect to testify; adduced neither proof for the failure nor proof of their competence. The Court's findings that Frank Smith was "an experienced builder of large offshore fishing vessels", that "construction was supervised on three or four occasions by Walter A. Simmons, a naval architect" and that "construction was completed * * * by experienced boat builders" (*infra,* 21a) are unsupported by proof.

Respondent sought to prove seaworthy construction by the observations of its president (b77-79; a145-166), a fishing captain who managed its business (a139; b12, 41, 73, 74), his son Andrew (a94-100), the surveyors Bryan (a52-79) and Moore (b52-57; a127-138), representing respectively the hull and P & I underwriters and as to hull bulkheads by Tony Cirrincione who ran a marine railway where the Karina T was hauled out for repairs (b18, 19; a87-92); all interested witnesses. Bryan was neither qualified nor competent (a64-69; 236-239).

The seaworthiness of the hull was not established (a57-63). It was divided into four compartments by bulkheads or partitions (bottom drawing C50) which should have

been water-tight to obtain insurance coverage (a69-71). The after partition was not designed to be water-tight (a86, 212); the two forward bulkheads were never tested for water-tightness (a72, 86-91); there was no bilge line forward of the forward bulkhead (C46 p2) so that bulkhead could not have been water-tight and there was drainage through it and the bulkhead aft of it (a72-74, 202, 219-224).

The afterhouse shown beneath the dory in (C1) was added after the pilothouse was built (a241-246), and utilized the after pilothouse bulkhead as its forward end (a208-209). The pilothouse remained attached to the vessel's trunk (shown in C6 by arrows) but the afterhouse was torn from its deck plate (C8, C9) for it was not properly joined or integrated with the pilothouse (a246-250, 255-257) and the owner's proof as to how it and the pilothouse trunk were secured was not sufficient and did not comply with the owner's answers to claimants' interrogatories (a74-76; 95-97; 160-165; 254-257; 281-285).

The pilothouse and afterhouse windows should have been shatter proof glass (a253-254) as respondent alleged in answers to interrogatories (a286, 287) but were not. The pilothouse windows forward of the pilothouse doors (shown in C1) were plate glass (a120-123); the remaining windows in both houses (shown in C1, C5A, C5B, C8, P*28) totalling eight were ordinary window pane glass (a152-153). There was no proof that the pilothouse and afterhouse doors were seaworthy. The afterhouse door in (C36) was not seaworthy (a252).

Inside the vulnerable afterhouse there was a hatch leading below to a space separated from the engine room by

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* The letter P identifies Respondent's Exhibits.

only a plywood partition (a209-213; 233-234; C50). Two witnesses said the hatch did not have a cover (a200, 215, 233, 234); respondent's president said it did but he could not explain its construction and said it was used only in port to prevent theft (a153-159). No one said that the cover was seaworthy.

The fish hatch (C32) had two wood hatch covers, one metal overcover and not two as shown (a204-206, 228). A flat hatch bar could be locked over the metal cover, but was not used and was designed to prevent theft in port (a150-152, 228, 229). Respondent did not attempt to prove the seaworthiness of the hatch or its coverings; they were not seaworthy (a263-265).

The Karina T was periodically hauled out, scraped and painted and had some repairs (a80-88) but there was no proof that she ever had a general inspection or overhaul to support the Court's finding that she was periodically "overhauled" (*infra*, 22a).

Except for the engine the District Court made no findings on the seaworthiness of any of the critical structures reviewed. The blanket finding of seaworthiness (*infra*, 21a, 22a) is unsupported by the sources of proof relied on, for neither the representative of the repair yard, the engine repairman nor the surveyors for the underwriters, testified that the Karina T was seaworthy.

The record is barren of any proof of the sea conditions the Karina T might reasonably anticipate on her last voyage or that she was then reasonably fit to meet them. Her captain and her mate in October 1957 (b126-129) who were

respectively the brother-in-law and friend of the owner (a292-294, 296-298) testied that she was then in a severe storm, not identified, and acted "very able" (a279-298; b127-130). During the remaining four and a half years to the disaster there is no proof to support the Court's finding that "those in command found her to be a very able sea boat" (*infra*, 21a). The only proof of the weather in which the Karina T operated before her loss was the storm of October 1957 and the owner's assertion that she was in a storm in January 1961 (b98).

About 2:00 PM on March 5 Captain Jorgensen of the Karina T told Captain Hansen that he was leaving the edge of the gulley (shown by the upper X on C4) because of a torn net and heading for Point Pleasant (a100-102); he was 73 miles southeast of his destination (a102) which must be reached through Manasquan Inlet which is unsafe in bad weather (a195, C4), but proceeded there in the face of successive storm warnings each predicting more severe weather (C43 pp. 2, 3); he did not attempt passage through Manasquan Inlet but drifted off the seabuoy outside the inlet the night of March 5-6 (a102-103; 107-108). The Karina T was last heard from on March 6 about 4:00 PM when she was off Barnegat Lightship (a103, 104). Hansen's testimony was contrary to respondent's answers to interrogatories 88(a) to (d) inclusive (a288, 289), and in fixing the position of the Karina T on March 5, it opened up a new issue, whether Jorgensen was negligent in not heading for the safe harbor of New York (a195) in heed of the storm warnings (see lines drawn on C4 from the gulley to New York Harbor and Manasquan Inlet). Claim-

ants' counsel claimed surprise and asked for a continuance and the appointment of separate counsel to represent Jorgensen's widow; the motion was denied (a183-194). There is sufficient proof in the record based on the weather reports (C43 pp. 2, 3), the speed of the Karina T (a229, 230) and the distance to New York Harbor (a174, 175; C4), to support a finding that Jorgensen could have reached that harbor and was negligent in not proceeding to it (a195, 198, 199). Respondent was in privity with the neglect by Carl Tobiasen the real owner (DT2-4) who ran the operations of the Karina T (b12, 41, 65-69), was in control of her movements by radio telephone (b73) and ordered her into Point Pleasant (a123-125, 168).

The most severe weather recorded in the area between Ambrose and Barnegat Lightships (shown on C4) which includes the area where the Karina T was reported during the storm, was at Barnegat on March 6 at 1200 and 1600 when the wind was force 10 or 55-63 miles per hour and the seas 13 feet (P5, pp. 3-8, C42, C44). Smaller fishing vessels than the Karina T survived (a98, 109, 110, 196-198; C48, C49). There is no support for the Court's finding that the Karina T was exposed to winds of "greater than 80 miles", hurricane force or that the storm was of "extraordinary intensity" at sea (*infra*, 22a). In finding that the Karina T was "destroyed by this storm" (*infra*, 23a), the Court in effect found that the storm was the sole cause of the disaster, an inference not supported by the record.

REASONS FOR ALLOWANCE OF THE WRIT

1. This Court has never considered the substantive rights of Jones Act claimants in a limitation of liability proceeding and the obligations of the vessel owner to them.

Although the Jones Act has been a prolific source of litigation and this Court has interpreted the Act on numerous occasions, it has never fixed the rights and obligations arising out of the Act in a limitation of liability proceeding. The matter is of great importance to the maritime industry of the United States.

2. Respondent not having surrendered the wreckage or its value in compliance with Admiralty Rule 51 (*infra*, 2-4b) of this Court and 46 USC 185 (*infra*, 1b), the District Court did not acquire jurisdiction and the right to enjoin claimants from prosecuting Jones Act jury trial suits. The decisions below are contrary to a decision of this Court and a decision of the United States Court of Appeals for the Second Circuit. One of the purposes of Rule 51 is to afford claimants a survey of the *res* to fix liability.

Like the statute, Admiralty Rule 51, 28 USC Rules requires the surrender of the wreckage or its value, and recites that, the petition for limitation shall set forth, "in the case of wreck, the value of her wreckage, strippings or proceeds, if any and where and in whose possession they are;" that if petitioner file "an interim stipulation in the case of wreck, the value of the wreckage, strippings or proceeds" be covered and that such stipulation shall be accompanied by an affidavit "as to the value of * * * her

wreckage"; that the Court duly appraise "the value of petitioner's interest in * * * her wreckage,"; and that petitioner without such appraisement may transfer his interest in "her wreckage * * * to a trustee to be appointed by the court." Petitioner not only did not comply but falsely swore there was no "salvage" (*supra* 5). The District Court never acquired jurisdiction, *Hartford Acci. & Indemnity Co.* v. *Southern P. Co.*, 273 US 207, 217; *Petition of Goulandris*, 140 F2d 780 (CA 4 Cir.), cert. den. 322 US 755; therefore the injunction it issued under Admiralty Rule 51 restraining claimants from prosecuting Jones Act jury trial suits was void. *Oil Transport Co.* v. *Verret*, 278 F2d 464 (CA 5 Cir.) appears contrary, though reversed as moot because of settlement, *Verret* v. *Oil Transport Co.*, 365 US 768. A limitation of liability proceeding "is the administration of equity in an Admiralty Court", *Hartford Acci. & Indemnity Co.* v. *Southern P. Co.* (*supra* at 216), which should not take jurisdiction where those who invoke its relief have concealed the *res*. The point does not appear to have been decided but should be.

In requiring petitioner to state "* * * where and in whose possession * * *" the wreckage or strippings are, Admiralty Rule 51 appears designed not only to protect claimants as to the value of the *res* but to give them an opportunity to survey it to determine the cause of the disaster. A most valuable right when, as here, the sea has buried the witnesses. The point has never been adjudicated but should be.

3. The proof necessary to establish seaworthiness in a limitation proceeding should be no less in the case of a non Government inspected vessel, yet the District Court found seaworthiness though the established standards of proof were not met. This Court should say whether a lesser standard of proof is required for the number of uninspected vessels is rapidly increasing. The decisions below are in conflict with decisions of this Court and United States Courts of Appeals.

Respondent had the burden of proving that the Karina T was seaworthy and that it was not in privity with the cause of the loss. *The S.S. Hewitt* (DCSD NY), 284 Fed. 911, 912; *The E. Madison Hall,* 140 F2d 589, 591 (CA 4 Cir.), cert. den. 322 US 748; *Kellogg & Sons* v. *Hicks,* 285 US 502, 510. Privity was not an issue as respondent had knowledge of the construction and condition of the Karina T (*supra,* 6). Respondent's absolute warranty of seaworthiness to the crew, *Mitchell* v. *Trawler Racer Inc.,* 362 US 539, required that it prove that the Karina T was so constructed, equipped and manned that she was reasonably fit to meet those sea perils she might reasonably anticipate during the voyage, *The Rappahannoch,* 184 Fed. 291, 294 (CA 2 Cir.); *Admiral Towing Line* v. *Woolen,* 290 F2d 641 (CA 9 Cir.); *Walker* v. *Harris,* 335 F2d 185, 191 (CA 5 Cir.), cert. den. 379 US 930. The burden is no less for those vessels not subject to Coast Guard inspection, *Walker* v. *Harris* (*supra* at 194-197). Respondent did not meet these standards of proof; it did not prove what sea perils the Karina T might reasonably anticipate on the voyage or what sea perils she was fit to meet (*supra,* 6-9). Her seaworthiness was not proved and the petition to limit should have been dismissed, *Walker* v. *Harris* (*supra,* 191-193); *Mitchell* v. *Trawler*

Racer Inc. (*supra*). Are the crew of vessels not subject to Government inspection entitled to less seaworthiness protection? Because of the increasing number of such vessels we think this Court should give the answer.

Turning to the proof, respondent failed to prove the soundness of a number of the critical structures of the Karina T, each of which could have caused her disaster (*supra*, 6-8). Additional inferences of unseaworthiness and negligence arose from respondent's failure to call the builder and architect, *Interstate Circuit* v. *United States*, 306 US 208, 226; *The New York*, 175 US 187, 204, 205; to give the vessel a stability test, *The Cleveco*, 154 F2d 605, 614 (CA 6 Cir.); to prove that she conformed to customary construction in the trade, *The T. J. Hooper*, 60 F2d 737, 740 (CA 2 Cir.); to periodically test the seaworthiness of the vessel, *The Rappahannoch* (*supra*); *Martin* v. *The Southwark*, 191 US 1, 15, 16. Concealment of the wreckage gave rise to a presumption of unseaworthiness and negligence, *Austerberry* v. *United States*, 169 F2d 583 (CA 6 Cir.); the District Court gave no consideration to respondent's failure of proof. Approval by surveyors for the underwriters on which the District Court relied (*infra*, 22a) does not establish seaworthy construction, *Petition of Southern Transp. Co.* (DCED Va.), 211 F. Supp. 940; *Sabine Towing* v. *Brennan*, 72 F2d 490 (CA 5 Cir.), cert. den. 293 US 611. The petition should have been dismissed for the Limitation Acts do not apply where there is a breach of warranty of seaworthiness, *Coryell* v. *Phipps*, 317 US 406, 410. That case holds also that this Court is not bound by a finding of seaworthiness not supported by the proofs.

4. An owner in privity with the unseaworthiness of his vessel may not have the benefit of the Limitation of Liability Act even though she perishes in a storm of "extraordinary intensity."

As respondent failed to sustain its burden of proof of seaworthiness, the Court erred in considering the storm as a causative factor. Relying on two narrative articles of the general nature of the storm (*infra,* 2a-7a) rather than weather data which disclosed the actual sea conditions the Karina T encountered, the District Court found the storm of "extraordinary intensity" (*infra,* 22a). We assume the Court meant to find that the storm was "irresistable, overwhelming and extraordinary for the particular time of the year", the controlling definition of an exemptive sea peril, *Eastern Gas & Fuel Asso.* v. *Martin Marine Tr. Co.,* 190 F2d 394, 396 (CA 3 Cir.). The articles do not bring the storm within the definition (P1, P3; *infra,* 2a-7a).

Assuming without conceding that the storm came within the exceptive definition of sea peril, the District Court erred in concluding that it was "the sole and proximate cause" (*infra,* 26a), for the unseaworthiness of the Karina T (*supra,* 6-8) was necessarily an intervening cause. The defense of inevitable loss by storm imposed the burden of proving that there was no intervening unseaworthiness or negligence, *Swenson* v. *The Argonaut,* 204 F2d 636 (CA 3 Cir.); *Patapsco Scrap Corp.* v. *Maryland Shipbuild. & Dry. Co.,* 268 F2d 817 (CA 4 Cir.). Respondent did not sustain the burden and could not because other and smaller fishing vessels than the Karina T survived, *The Louisiana,* 70 US 164; *Patapsco Scrap Corp.* v. *Maryland Shipbuild. & Dry. Co.* (*supra*); *States Steamship Co.* v. *United States,* 259 F2d 458, 462 (CA 9 Cir.).

5. The proof of negligence and causation required to support Jones Act death claims in a limitation proceeding should be no greater than the standard of required proof pronounced by this Court for Jones Act jury cases in *Ferguson* v. *Moore-McCormack Lines*, 352 US 521. Claimants more than satisfied that standard; the Courts below did not apply it. The decisions of United States Courts of Appeals on the point are in conflict.

In a limitation proceeding Jones Act death claimants must establish the vessel owner's negligence; they may rely on the unseaworthiness of his vessel and his privity with it, *Kellogg & Sons* v. *Hicks* (*supra*). Ferguson set the required standard of proof of negligence in Jones Act jury cases: "'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" 352 US at 523. The standard is no less when Jones Act death claimants are compelled to resort to a limitation proceeding to prove their claims, *Admiral Towing Line* v. *Woolen* (*supra* at 649-652); causation was inferred, the unexplained loss of a two man tug was found due to the inexperience of one of her deckhands. No other limitation case has expressly applied the Ferguson standard, though *Walker* v. *Harris* (*supra*) applied its principles in sustaining Jones Act claims. *The Carroll*, 60 F2d 985, 993 (CA 2 Cir.); *The Ariel*, 119 F2d 866 (CA 2 Cir.); *The Ballantrae*, 208 F2d 346 (CA 3 Cir.), all applied a far more exacting standard of proof in denying such claims. The District Court below was confused as to the applicable law (*infra*, 23a-26a) and gave no consideration to the standard of proof required. This Court has not set the standard

of proof required in a limitation proceeding and should resolve the conflict.

6. In failing to consider the conduct of the Captain of the Karina T in not heading for the safe port of New York in heed of storm warnings, respondent's privity, and in denying claimants' motion for a continuance on those issues, the District Court erred.

Although there was factual basis for finding Captain Jorgensen negligent and respondent in privity (*supra,* 9-10), supported by a decision of this Court, *Kellogg & Sons* v. *Hicks* (*supra*), in neither opinion nor findings did the District Court (*infra,* 1a-31a) consider those issues. As they arose unexpectedly because of respondent's misleading answers to interrogatories (*supra,* 9-10), to the detriment of Captain Jorgensen's widow and made it imperative that she have separate counsel, the District Court in administering equity, *Hartford Acci. & Indemnity Co.* v. *Southern P. Co.* (*supra*), should have granted a continuance as to those issues.

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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OPINION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 765-62

In the Matter of the Petition of KARINA T. CORPORATION, as owner of the FISHING VESSEL KARINA T, her engines, etc., in a cause of exoneration from and limitation of liability.

LANE, *District Judge*:

The eighty-ton fishing vessel Karina T put to sea on February 28, 1962, from Point Pleasant, New Jersey. Between the fifth and eighth of March, a storm raged along the Atlantic coast of the United States. At some undetermined time and place during those four days, the F. V. Karina T was lost with all hands.

The Karina T Corporation [petitioner], owner of the Karina T, seeks exoneration from liability or, in the alternative, limitation of liability to the value of the wreckage pursuant to 46 U. S. C. §183.[1] Claims have been filed

[1] The cited statute reads as follows:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. 46 U. S. C. A. §183(a) (1958).

There was apparently no pending freight at the time of the loss of the Karina T.

against petitioner by six women [claimants] seeking a total of $660,000.00 damages as next of kin for the loss of pecuniary benefits to themselves and for pain and suffering of the deceased seamen. We hear this case under the original and exclusive jurisdictional grant of 28 U. S. C. §1333, and the relevant federal statutes.

The resolution of this petition imposes a weighty burden upon the court. While the applicable legal principles, considered *infra*, pose no serious problem, the all-important factual determinations, due to the nature of this most unfortunate occurrence, must necessarily entail some reliance on the probable and the speculative.

It is under this cloud of the unknown, and in fact, the unknowable, that the court must adjudge the right of claim of the stricken widows and families.

Thus, it is that we see fit to summarize the evidential record of the case at bar. Only from a full consideration of all this evidence—in the form of trial testimony, depositions, and exhibits—can the court arrive at factual findings dispositive of the legal questions placed before it.

Of prime importance to this petition is the factor of the storm. In any given instance, a situation of a full-blown hurricane would significantly increase the probability of non-negligence and seaworthiness. Conversely, petitioner would be confronted with a most onerous burden should a ship be lost during a period of relative calm, with no other explanation.

Certified meteorological data adduced at trial convincingly show the storm in question to be one of extreme or near-extreme proportions. A United States Department of Commerce Weather Bureau report, *East Coast Storm March 5-9, 1962*, had this to say by way of summary and explanation:

Appendix A—Opinions, Decree and Judgment

"*General*:

One of the most severe Atlantic storms in recent history battered the East Coast of the United States during the week March 5-9, 1962. Great destruction was caused by high waves and breakers superimposed on high tides. The hugh waves and breakers eroded the beaches and sand dunes and destroyed buildings along the shore. The tides flooded low-lying coastal towns, portions of cities, and other low-lying coastal areas. According to press reports the damage was most severe from Long Island to the Outer Banks of North Carolina but the effects were felt from Maine to Florida. Preliminary estimates indicate the storm took more than 30 lives and inflicted property damage of several hundred million dollars.

"*Development and Movement of the Storm*:

The storm was complex in structure and unusual in behavior. It started as a weak circulation along a cold front in the Atlantic east of Florida on March 4. At the same time a widespread but rather weak storm area was moving slowly eastward through the Mississippi Valley. By the afternoon of Monday, March 5 the circulation off Florida had moved northward to a position off the Carolinas, had deepened, and had partially merged with the midwestern center which by this time had moved to the Upper Ohio Valley. The offshore storm center continued to intensify and move slowly northward during the night of March 5 and 6 and absorbed the weakening center in the upper Ohio Valley. By Tuesday the 6th the storm area had grown to encompass the eastern

third of the United States and a large part of the western North Atlantic.

"During the day Tuesday the main center of the large storm stopped moving north and became nearly stationary off Delaware, Maryland, and the Virginia capes. During this time also the storm became elongated east-west and appeared to have at least two centers. The western center apparently described a small loop westward over Chesapeake Bay and then southeastward into the Atlantic off the Outer Banks of North Carolina. This complex pattern of multiple centers persisted as the storm moved eastward out into the Atlantic on the 7th and 8th.

"Development of High Tides and Waves:

The height and energy of waves is dependant upon the wind speed, the "fetch" length which is the distance over which the wind blows in essentially a constant direction, and the length of time the wind blows over the fetch. During the period when the intensifying main storm center moved slowly northward off the Carolina coast and became stationary near the Virginia Capes, a gradually increasing fetch developed to the north between the center and New England. Strong winds from the east and northeast blew over this fetch for a long time. The force of the wind set in motion currents along the shore, raised the level of water at the shore, and generated waves of increasing height which broke on the beaches with growing destructive force. The "fetch" of strong onshore wind became unusually long and persistent. The result in this storm was unusually high wind-driven tide, very high waves which kept battering the shore for a long time, and a widespread

pattern of waves traveling out of the storm which eventually affected virtually the entire East Coast of the United States.

"* * *

"Comparison with other Major Storms in Recent Years:

"In the New York area the tidal flooding of March 6-8, 1962 was more destructive than that which accompanied Hurrican "Donna" in September 1960. The high water of "Donna" reached 8.2 feet above mean sea level (MSL) at the Battery but occurred at only one high tide, after which the waters receded rapidly. In the March 6-8 storm damaging high waters occurred on five successive high tides over a period of 48 hours. The highest of these reached 7.1 MSL; added to this, waves of 20 to 30 feet were reported. Their momentum carried the water inland, and it reached houses and buildings which would ordinarily be beyond the reach of a 7-foot tide. All houses within reach were pounded and undermined and many swept out to sea as the tidal waves swept back and forth many times during the 48-hour period. The respite between successive high waters was only about 6 hours since flooding stages were maintained 2-3 hours before and after high tide.

"* * *

"Along the New Jersey coast the tides were approximately equal to those in the September 1944 hurricane. However, the recent storm lasted much longer. "The islands of Chincoteague and Assateague were completely covered with water." (Pet. Exhibit 1 in Ev., pp. 1-2.)

A second official Weather Bureau publication reported as follows:

> "A slow moving late winter coastal storm combined with spring tides (maximum range) wrought tremendous destruction to coastal installations from southern New England to Florida on March 6-9. This storm, which consisted of a series of Lows, has been described as one of the most damaging extratropical cyclones to hit the United States coastline. Although gale force winds, and at times hurricane force winds, accompanied the storm, this is not unusual for a North Atlantic winter extratropical cyclone. It was the long fetch and the persistence of these strong northeasterly winds which raised the spring tides to near record levels. The tidal flooding which attended this storm was in many ways more disastrous than that which accompanies hurricanes. The storm surge in tropical cyclones generally recedes rapidly after 1 or 2 high tides, but the surge accompanying this storm occurred in many locations on 4 and 5 successive high tides. In addition to this, many places reported run-up of waves 20 to 30 ft. high.
>
> "This successive onslaught of wave and tidal action for over two days weakened and undermined even the more permanent shoreline structures, and after a period of time some suffered structual damage and collapsed. Needless to say many of the less sturdy summer cottages on the exposed coast were washed away completely.
>
> "The erosive effect of wave and tidal action changed the face of the immediate coastline, and on many of the well-known beaches the most severe loss

was often the sand of the beach itself. In addition many new channels and inlets were cut in the shoreline. It may be many months before new surveys of the topography and hydrography of the area reveal all the numerous changes.

"Preliminary estimates of damage total about $200 million; 1,793 dwellings were destroyed, 2,189 sustained major damage, and 14,593 minor damage. Thirty-three persons are known dead; 340 received major injuries and 912 minor injuries.

"* * *

"NEW JERSEY.—In this State, as in others along the coast, the major damage was restricted to property facing the beach itself. The entire coastline and even the Delaware Bay area suffered from the high tides. Highlands along the coast were cut in many places or buried under several feet of sand. Thousands of homes along the coast were damaged or destroyed. One of the hardest hit areas was Long Beach Island. At Atlantic City the major damage was the cutting of the famed Steel Pier. The storm swept away the quarter-mile section of the pier which connects the auditorium at the end of the pier with the mainland boardwalk. A Navy destroyer, the MONSSEN, was beached about a half mile north of Beach Haven after breaking its tow. The destroyer was unmanned and was being towed to Philadelphia from Bayonne Navy Yard. Another destroyer, the PENOBSCOT, ran aground a little farther south." "Great Atlantic Coast Storm, 1962," *Mariners Weather Log*, Vol. 6 No. 3, May, 1962. (Pet. Exhibit 3 in Ev., pp. 79-82.)

TESTIMONY

Captain Carl Tobiasen, 74 years of age, president of the Karina T Corporation, a seafaring man for sixty years who had served as captain on numerous fishing vessels, stated that he contracted to have the Karina T built by one Frank Smith, whose yard was located in Bena, Virginia. The captain further testified that the contract price was $32,000, and that Smith built the craft without plans or specifications; that he, Tobiasen, did, however, engage the services of Walter A. Simmons, a naval architect of Philadelphia, who observed the construction at Bena and who drew a profile view of the vessel after construction had been started, for which he received $300; that he, Tobiasen, had made several trips to the Bena yard during construction and that in 1955 the vessel was taken to Stowman's Yard in Maryland; that he had actually paid Smith $25,000 for his work and $18,140 to the Stowman Yard for completing and making some changes in the vessel's construction; that a stability test had never been made and that while at the Stowman Yard, the original two fish hatches had been changed to one hatch and a fourth free port had been installed in the engine house, and that the single fish hold hatch had constructed for it a metal cover, 3 by 4 feet, with a bar supplied to lock down this metal cover; that the after deck house had installed in its deck a hatch that had a sliding wooden cover and that the hatch, when slid forward, was secured to the passageway.

Captain Tobiasen testied that the pilot house and the after house were of an integral construction and the after house was secured with four tie rods on each side and one in the middle of the stern, that these rods started at the top of the after house and went underneath the cross beams and were further secured with bolts that went through the deck and into and through the timbers, and that these

bolts were secured with washers and nuts at the bottom of the timbers; that the pilot house was secured in pretty much the same manner, with tie rods fastened to the trunk, three in front and three in back.

He testified that he had at first experienced considerable difficulty with the cylinder head of the engine installed in the vessel, that in December of 1959, at a Colonna ship yard, cracks in the cylinder head were welded, and that in April of 1960 a new cylinder head was installed. In December of 1961 a rebuilt cylinder head was installed. In December of 1961 a rebuilt cylinder head was placed in the engine, and in September of 1959 the suction valve in the bilge line was changed, and that the corporation had spent from the time of construction until the loss of the vessel some $7,450 for engine repairs.

Captain Tobiasen stated that at six a.m. on Tuesday morning, March 6, 1962, Captain Jorgensen had called him over the radio-telephone from the Karina T and stated that it was rough at sea and that he, Tobiasen, then looked out of his bedroom window and saw that the streets were flooded. Jorgensen informed him he was experiencing 70 to 75 mile winds and very heavy seas, yet the Karina T was sitting on the water like "a bird" and taking on no water, at a location east-southeast from Point Pleasant, in 18 fathoms; that she was carrying 150 boxes of big fluke and 1,500 pounds of lobster; and the ship would be in in the morning. Captain Jorgensen also said he expected the wind to change to the northwest, but he, Tobiasen, know that the wind probably would not change to the northwest and that if it did there would be a boiling sea near the shoreline making it impossible for the ship to put into port. Tobiasen stated that the Manasquan Inlet in a northeast storm is a very difficult channel to enter and that he did not tell Captain Jorgensen what to do or where to make port as he had full confidence in the captain's ability as a command-

ing officer and he felt that Jorgensen knew the conditions and could better judge the situation.

Captain Tobiasen also testified that he had after this call phoned the fish dock to tell them to expect the Karina T in the morning, and that when the ship failed to arrive, he made various inquiries and attempted with his son to call the vessel; that he had a call made to the Coast Guard in regard to it, and that when the Coast Guard informed him a few weeks later that wreckage of the vessel had been found on an island off the coast of Virginia, he viewed the wreckage with his son.

Andrew Tobiasen, son of Carl Tobiasen, and the captain of the fishing vessel Serena II since 1955, and a shareholder in the Karina T. Corporation, the corporation that held title to the Serena II, had on two or three occasions observed construction of the Karina T. He testified that the trunk of the vessel was located over the engine room and constructed in a manner to provide headroom; that the trunk was bolted through the timber cross members, and that the pilot house and the after house were also bolted to the trunk and cross pieces.

Andrew Tobiasen told of his efforts to contact the Karina T at the time of the storm early in March 1962, calling from his vessel Serena II then docked at Atlantic City. He stated that on March 6, 1962, a tremendous storm was raging and that there was water in the streets of Atlantic City; that about noontime he attempted to contact the Karina T on the radio-telephone installed in the Serena II, which had a range of 125 miles; that he made several unsuccessful efforts during the afternoon and evening hours of March 6th; that again on March 7th he made further efforts using the telephone equipment aboard the Sylvia A which was more powerful than that located on his own craft; that again on March 8th he tried to talk with the Karina T from his vessel without success; and that he

was unsuccessful in continued attempts made on March 9th. He averred also that he contacted the Coast Guard and various people on the docks and could find no one who had had a response from the Karina T with the sole exception of a Captain Hansen of the vessel Manchonoch who had talked with the Karina T about 2:00 a.m. on March 6th. He further testified that on Sunday, March 11th, he searched by plane for the Karina T from the Atlantic City area east and south to the 30 to 40 fathom line, all the way to Virginia, but saw no signs of the missing vessel; that he requested other planes to make a search; that several weeks later he first learned from the Coast Guard that a portion of the Karina T was located at Assateague Island off Virginia; that he went to Virginia to see the wreckage and reached it by crash boat and jeep; and that he found an after pilot house which he identified as a portion of the Karina T and that it was of no value whatsoever.

Clifford Sharp, a supervising carpenter in the Stowman ship yard, testified that in 1957 the Karina T was brought to the yard where his men shortened the front of the pilot house some 18 inches. Sharp stated also that the pilot house had two windows in each side and ¼-inch plate glass windows on the forward bulkhead; that when they installed the new forward bulkhead, it was bolted through the beams and they used ¾-inch galvanized steel tie rods to secure the completed house to the underside of the beams; and that the cutting back of the forward bulkhead of the pilot house gave more room for the operation of the winch.

Tony Cirrinicone, the proprietor of Tony's Marine Railway, testified that on eight occasions during the period January 1956 to December of 1961 the Karina T was brought to his yard for repairs and maintenance, and that during this period the aggregate bills for such work totaled $7,820.15. It appears that on July 18, 1956, the Karina T was hauled out and its hull scraped and painted, that iron

guard rail was installed and certain work done on the piping; that on January 12, 1957, the Karina T was again hauled out by Tony's workmen and painted, further pipe work accomplished, and an iron guard rail installed; that on December 29, 1957, the Karina T was hauled out, scraped and painted, pipe fittings installed and oak sheathing added; that on May 16, 1958, the vessel was hauled, scraped and painted, and further oak sheathing added; that on January 7, 1959, hauling, scraping and painting was accomplished and pipe work done on the bilge lines as well as further sheathing; that on January 25, 1961, the vessel was hauled out, scraped and painted, the shafts checked and the propeller reconditioned and that steel sheathing was placed on the sides; that on April 19, 1961, a general overhaul was accomplished, the shafts checked and the propeller reconditioned; that on December 14, 1961, the last time the Karina T was at Tony's yard, a general overhaul, painting and cleaning were accomplished, during which Captain Tobiasen came to the yard to review the work.

It was further established that Tony Cirrinicone has been in the boat repair and maintenance business for 44 years, has constructed 20 or more fishing vessels, and has as many as 60 to 70 fishing vessels in his yard at one time for repair and maintenance.

The witness, who supervises all work done in his yard, testified that there were three bulkheads installed in the Karina T, the two main bulkheads being watertight; that the after bulkhead was located between the engine room and the fish hold, and the second between the fish hold and the front peak, and that a third bulkhead, that separated the engine room from the stern section, was not watertight; that the bilge piping system ran into the fore peak through the fish hold and into the engine room where the pumps were located, and that there was a separate bilge line to

each compartment; and that the bilge pump was operated by the main diesel engine. He testified that there was one fish hatch, and that although his yard had not worked on the two watertight bulkheads and he had not tested them with a hose, he knew them to be watertight; just as he knew that the after bulkhead was not watertight.

Otto Parkkonen, a machinist, testified that on February 23, 1962, a few weeks before the vessel was lost, Captain Jorgensen called him at his machine shop in Atlantic City and reported that the Karina T had been brought into port because they had been experiencing trouble with the fuel system; that, accordingly, he drove to Point Pleasant on the 24th, where he was told that Captain Jorgensen had found it impossible while fishing to hold high speed because there was air in the fuel system; that he removed the fuel transfer pump; and on Monday, February 26th, he rebuilt the pump at his shop; that on Tuesday, February 27th, he replaced it and while testing the system found there was still some air in the line. Thereafter, he tightened all connections, and on Wednesday, February 28th, with Captain Jorgensen on hand, he ran the engine all day, and after eight hours running time was satisfied that there was no longer any air in the system and that the engine was in excellent operating condition. Prior to this work, in December of 1961, he had been alerted by the captain to be ready to work on the Karina T and had done mechanical work during the period December 20th-December 30th, which included repairs on the following; winch, deck pump, fresh water pump, engine valve, engine cylinder valve, removal of cylinder head and replacing it with a rebuilt cylinder head, installation of components of head valve, and the sealing of the valve; and that at the end of this period he found the engine very satisfactory. This mechanic further testified he had first done repair work on

the Karina T in December of 1960 and had on various occasions been told to fix whatever was defective; that his suggestions were generally accepted by the captain; that he considered the engine room a superior one for the type of vessel; that he saw no evidence of wrongful operation or incorrect maintenance; and that the only alarm device he recalls having been installed on the Karina T was one connected with the oil system, causing a buzzer to sound or a bell to ring when the oil pressure dropped.

Harry D. Bryan, a marine surveyor for a period of 13 years, had, prior thereto, taken mechanical engineering courses at Drexel, and briefly served as general supervisor of consruction at the Robbins Company Boat Yard in Annapolis and at the Georgetown Yacht Basin. Bryan estimated he had inspected some 250 fishing vessels of similar type to the Karina T, and some 600 or 700 overall. He testified that he first boarded the Karina T on January 17, 1960, and subsequently surveyed the vessel for his insurance company on April 7, 1960, on April 3, 1961, and finally on December 14, 1961. As a result of his recommendations during these periods of survey, his company, the Boston Old Colony, carried the insurance on the vessel's hull.

Bryan last boarded the Karina T in December of 1961 at Tony's Marine Railway in Cape May. At that time the vessel had been hauled out of water and his mission was to determine from its appearance and the maintenance of the vessel whether his company should still continue with its coverage. On this occasion he found the yard personnel had placed galvanized sheeting in the waist, and that the shaft and the rudder were being attended to. He was of the opinion that the Karina T was generally in a seaworthy condition and worthy of insurance, and having found no evidence of defects in the seams and no structural weaknesses, he recommended that his company continue to cover the hull.

On April 3d of 1961, Bryan had boarded the Karina T at Atlantic City to determine whether there had been compliance with the recommendation that he had made in regard to the installation of certain free port valves in the pumping system; he found that the recommended valves had been installed, the housekeeping on the vessel was good, the gear properly stored, and the boat well cared for. On this occasion he also made a general inspection of the engine room and found it to be in good shape.

On January 27, 1960, the first time Bryan had surveyed the vessel, he found she was constructed of long-leaf yellow pine, and that the decks were white oak sheathed with a good grade of yellow pine, that the engine room had double oak frames, the floor timbers were tied into the frames, and that the fore and aft planks were drift-bolted; that there were three compartments with two watertight bulkheads made of diagonally planked pine, and that the engine was a 360 horsepower Waukesha diesel supplied by four 800 gallon tanks situated just aft of the engine room; that the foremost piece of wood, the stem, was notched with the fore and aft planks; that there were deck beams across the vessel and the engine space floor timbers were double white oak. He had inspected the electrical system and found it to be in good working order, as well as hoisting equipment, fuel tanks, and so forth. He stated also that in his various surveys he found the Karina T to be a well-constructed ship in which materials of high quality had been used, and that he recommended to his company that they continue with their insurance coverage because the vessel was structurally sound.

Bryan testified that he never asked for plans of construction. He further testified that while his survey work sheets did not indicate the finding of watertight bulkheads, he did assume they were watertight from his inspection, and this, although he had not actually effected tests of

watertight condition. He did not recall whether he observed the bilge suction line running all the way into the first compartment, but he did recall observing coverings for the fish hatch and the aft pilot house, and that they seemed adequate.

Hartwell Moore, a marine insurance surveyor, whose company carried insurance on the Karina T for loss of life and injury, was called to the stand by petitioner. It appears that Mr. Moore, since 1933 to the present, has worked for insurance companies, surveying some 100 fishing vessels each year. He testified that he was first assigned to inspect the Karina T on March 17, 1960, at Point Pleasant, New Jersey; that on this occasion he inspected the various compartments, pilot house, navigational equipment which he requested the captain to operate in his presence, the engineering room and pumps, fire extinguishers, the working gear, winches, brakes, standing rigging, masts, and the life saver equipment consisting of two 14-foot dories and a 10-foot life raft, and 10 life jackets, and two life rings. Mr. Moore also stated that he was satisfied the Karina T was then in seaworthy condition, and accordingly, recommended that his company continue to carry its policy; that on March 16, 1961, he conducted a similar inspection, and at this time again found the ship in seaworthy condition and that the recommendations that had been made had been complied with. Mr. Moore testified further that the fishing hold hatch of the Karina T had two wooden covers that set down flush with the conning and a single metal cover to be placed over the wooden covers, and that the metal cover was secured with a hatch bar which locked in place; that the pilot house was secured through the trunk by means of galvanized tie rods bolted to the cross beams; that the engine room had four port lights on each side and there was used two six- or eight-inch scoop-like vents; and that

he found the after deck house to be secured in the same manner as the pilot house.

Sigurd Hansen, captain of the fishing vessel Manchonoch, 112 feet overall and 14-foot beam, with 330 horsepower, and which weathered the storm that commenced March 5, 1962, stated that on the afternoon of March 5th, when his vessel was fishing 20 miles southwest of the gully, he talked with Captain Carl Jorgensen of the Karina T who indicated he was fishing at the edge of the gully at a position approximately 73 miles southeast of Point Pleasant; and that Jorgensen stated he had torn his fishing net and would soon thereafter head for the home port of Point Pleasant; that he, Hansen, again talked with Jorgensen in the early hours of March 6th and was told that the Karina T had shut off its engines just off the buoy at Point Pleasant, some two miles off the Manasquan Inlet, and was going to wait for daybreak before moving into Point Pleasant; that again he talked with the Karina T on March 6th at 4:00 p.m. and that the mate on the Karina T, Jack Magee, informed him that the ship was just off the Barnegat Lightship; and that at this time (4:00 p.m., March 6th) Hansen's boat was some 40 miles off the Manasquan Inlet. Captain Hansen related that when he first talked with the Karina T, the afternoon of March 5th, the weather was quite good and there had been no stormy weather reports, that the winds were at 35 to 40 miles per hour and the weather was fair enough for fishing purposes; that thereafter it had become rough, and on the early morning of March 6th the weather reports indicated the wind would change to the northwest; that throughout March 6th the weather became increasingly stormy and the winds advanced to 70 miles per hour, and before the storm was over, surpassed 100 miles per hour; that Hansen's fishing vessel took on a good deal of sea water and 26 feet of the waist of the boat was broken by the storm; that it was the worst storm that Hansen had

seen in 50 years of experience at sea, with the waves 25 to 30 feet high, and that Hansen himself remained at the wheel for 48 hours; that it was 60 hours before the wind went around to the northwest and that a tidal current was evident throughout the storm and that Hansen's vessel, in an attempt to reach shore, lost four miles during a ten-hour period when he was headed into the wind; that there are shoals off the shore from Barnegat Light to the coast of Virginia, and that as a rough sea reaches the shoals the waves increase in height; and that Hansen had either talked with or heard conversation from eight or ten fishing boats, all of which were able to make port with the exception of the Sonya.

Lewis R. Freeman, who had charge of marketing the fish that the various Point Pleasant vessels brought in, stated that on March 6th at 3:00 p.m., he had a radio-telephone conversation with Captain Jorgensen from aboard the vessel Adele and was told that everything was "fine as kind," Jorgensen's expression for everything was in order and going well; that Jorgensen stated he was jogging off shore, that on the morning of the 6th Captain Tobiasen had informed Freeman that the Karina T would be in that day with a load of fish and that he called the ship because it had not arrived; and that on March 7th he again managed to get to the dock where the Adele was tied up and made several unsuccessful attempts to reach the Karina T.

Claimants called *Ruald Biktjorn,* who has been employed as a fisherman since 1956 and who was a member of the crew of the Karina T from the Spring of 1961 to Christmas of that year when he was laid off because the crew was then changing from a scalloping crew to a dragging net crew of seven men. Biktjorn stated he served as mate for three months, standing two watches of six hours each, alternating with the captain; that after the first trip he served as the engineer because the regular engineer had

become incapacitated; that he had no engineering license and knew little about engine repair, having taken no courses in connection with such; that he slept in the after compartment below decks and that he reached this compartment through the after house companionway, which is three or four feet in size, and he does not recall while he served aboard the ship of there ever being a cover over this opening; that one of his duties was to pump out the bilges, that the bilge line did not extend into the fore peak, and that he pumped out the fish hold and the engine room, and that the bulkhead between these was not watertight in his opinion because water came from the fish hold into the engine room; that there was a crack in the block on the port side of the engine to which fluid was added to seal the engine so that water did not escape, and that there was a single steel cover on the fish hatch and this covered the whole hatch. Biktjorn further testified that in March of 1962, during the storm, he was serving on the 130-foot fishing vessel Cliffway and that during the storm this vessel could not make headway and indeed lost ground, and after the storm put into Portsmouth, Virginia, having lost 15 feet of railing.

Harry M. Tiedemann, a 1943 graduate of M. I. T. with a degree in naval architecture, who has worked in a number of ship yards and in ship operation with the Grace Line, and now operates a naval architectural office in New York City, testified for claimants. Mr. Tiedemann had been consulted some two months prior to trial and based his testimony on his examination of certain photographs of the Karina T admitted in evidence, plus some information as to its construction which had been supplied him. He testified that the Karina T was a boat of 81 gross tons, 55 net, of 73-foot length, and 23-foot beam, with a depth of 8.1 feet, an engine with horsepower of 360, and that the vessel was constructed in 1954. He expressed the opinion that a vessel of that size could not be built properly without drawings

and specifications which would show the detailed sizes of members and methods in which they were to be laid out, together with size of watertight bulkheads and their manner of being secured; that it was essential that a vessel of this type have watertight bulkheads and compartments so that if one compartment became flooded the ship would continue to float, and that a vessel of this size should have a collision bulkhead located four or five feet from its peak. Mr. Tiedemann testified that the location of bulkheads is all-important in determining safety factors; that the photographs that he had examined would indicate that the pilot house and the after house were not of integral construction; and that the photographs also indicated a structural weakness in the manner of connection and securing between the pilot house and the after deck house; that the after deck house was not seaworthy in that it had insufficient vertical spacing, that a wooden door with panel inserts had been installed there rather than a solid, heavily-constructed door; that safety, shatterproof glass had not been used, that the trunk had not been bolted to the longitudinal members of the ship, and that the vertical members of the after house should have been tied into cross pieces with clips or angle irons. He further testified that before operation, the Karina T should have been subjected to a stability test, that the draft and freebroad should have been established, and that the fish hold hatch was, in his opinion, unseaworthy and could have been washed off in a storm.

On cross-examination, he admitted he had never taken part in the design, building or construction of a wooden fishing vessel, nor had he ever inspected one, nor had he ever seen a fishing vessel with a collision bulkhead, nor one with a curved after bulkhead on the deck house, and that his testimony as an expert was based on limited information as to fact.

There was also introduced into evidence the depositions of *Carl Tobiasen,* owner, as well as those of *Hans H.*

Syre, captain of the fishing vessel Enterprise; *Fred Thorkilsen,* who for a time served as a fisherman and as engineer aboard the Karina T; *John Olsen,* who served aboard the Karina T for a few months in 1957; and of *Hans Isaackson,* captain of the fishing vessel Vagabond, who was master of the Karina T during the period 1955 through 1958. The depositions present little evidence that was not adduced at trial with the exception of testimony to the effect that Frank Smith, of Bena, Virginia, the builder who constructed the Karina T, had had considerable experience in the construction of similar fishing vessels, and that the Karina T under the command of Captain Isaackson, had proven to be a very able sea boat, capable of good performance in all kinds of weather, including storms in which winds blew at a velocity of 60 to 80 miles per hour.

Findings of Facts

Construction

The proofs establish that the Karina T was constructed in 1954-55 at the Bena, Virginia, boat yard of Frank Smith, an experienced builder of large, off-shore fishing vessels; that the construction was supervised on three or four occasions by Walter A. Simmons, a naval architect retained by the owner on a limited basis; that the construction was completed at Stowman's yard in Maryland by experienced boat builders; and that for a period of seven years prior to its disappearance in March 1962 the Karina T operated in off-shore commercial fishing activities in all kinds of weather including storms of considerable dimension; and that during its seven years of commercial fishing use no one had occasion to question the stability or seaworthiness of the vessel but rather those in command found her to be a very able sea boat.

Repairs, Maintenance, Inspection

During seven years of operation, the owner of the Karina T periodically had the vessel hauled out, scraped and painted, and overhauled by experienced boat yard personnel, the last overhaul being accomplished in December 1961, some three months prior to her fatal voyage. Similarly, the owner arranged for engine repairs and maintenance as were necessary and, in fact, just one week before the vessel's disappearance, a qualified repairman had spent considerable time aboard the Karina T and had left the engine in excellent operating condition. Furthermore, marine surveyors, whose companies carried insurance on the vessel, conducted several inspections of the Karina T during the two years preceding her loss and on each occasion found her and her equipment in seaworthy condition and qualified for continued insurance coverage.

Storm and Communications

The early March storm in which the Karina T was lost was one of extraordinary intensity and of three days duration, during which time its fury continued to build up to the extent it was considered the worst storm experienced locally in 50 years. During the course of events, all vessels at sea were driven southwesterly by northeast winds which at times attained a velocity of greater than 80 miles, and the Karina T which had arrived two miles off shore at the Manasquan Inlet buoy prior to the full development of the storm was driven along the Jersey shoreline to a point close to the Barnegat Lightship and beyond. Every attempt was made to maintain communications with the vessel during and after the storm in an effort to be of assistance to the men aboard.

Loss of Vessel

The Karina T was destroyed by this storm at a point or points unknown and all hands were lost. Several weeks after the storm there was found on Assateague Island off the coast of Virginia the wreckage of the pilot house. This portion of the vessel was all that was ever seen of the lost Karina T and it was of no value.

Conclusions of Law

The controlling law—that pertaining to the wrongful death of seamen—has variously been characterized as "deplorable," "anomalous," "archaic," "unnecessary," and "hard to understand," *Gillespie* v. *U. S. Steel Corp.*, — U. S. — [Decided December 7, 1964; No. 10—October Term; dissenting opinion, p. 2].

It is well-established, however, that the general maritime law, the common law of the sea, affords no action for wrongful death. Remedies for such misfortunes must be found in either state or federal statutes. *The Tungus* v. *Skovgaard*, 358 U. S. 588, 590-91. To this end the Jones Act, 46 U. S. C. §688, was passed by Congress in 1915. While that legislation has been subject to a somewhat constricted and controversial interpretation, its present application was nonetheless clearly reaffirmed in the Gillespie decision:

> "In 1930 this Court held in *Lindgren* v. *United States*, 281 U. S. 38, that in passing §33 of . . . the Jones Act, Congress provided an exclusive right of action for the death of seamen killed in the course of their employment, superseding all state death statutes which might otherwise be applied to maritime deaths, and, since the Act gave recovery only for negligence, precluding any possible recovery based on a theory of unseaworthiness. A strong

> appeal is now made that we overrule *Lindgren* because it is said to be unfair and incongruous in light of some of our later cases. . . . No one of these cases, however, has cast doubt on the correctness of the interpretation in *Lindgren*. . . ." *Gillespie* at pp. 5-6.

Hence, should the destructive incident have occurred in New Jersey territorial waters, the Jones Act would provide the sole vehicle for this action; and a finding of negligence would be requisite to any recovery, New Jersey statutory or maritime law to the contrary, notwithstanding.

If an accident can be shown to have taken place "beyond a marine league from the shore," the Death on the High Seas Act, 46 U. S. C. §§761-68, may be applicable. Aside from a differing list of who may recover, a factor not material to the case at bar, and the marine league (three-mile) requirement, this statute shares a common legal foundation with the Jones Act. Gilmore and Black, *The Law of Admiralty*, §§6-29-32 (1957). Some cases, however, have extended, or have intimated extension of the seaworthiness doctrine to deaths occurring outside the three-mile limit under The Death on the High Seas Act. *Holland* v. *Steag, Inc.*, 143 F. Supp. 203; see also dissenting opinion of Mr. Justice Goldberg in *Gillespie*, p. 1.

Claimants have here alleged that the loss of the F. V. Karina T was due to her defective, unsafe, unseaworthy condition, and lack of adequate repair, all within the privity and knowledge of the petitioner and its agents or employees. They further charge negligence in operation, particularly in petitioner's failure to order the vessel to return to port following commencement of the fatal voyage. Thus, three possible patterns of liability are herein presented: no negligence whatsoever, which would result in complete exoneration of petitioner; negligence, but without the privity or knowledge of petitioner, thereby qualifying it for limitation under 46 U. S. C. §183; and the separate question

of seaworthiness, which could apply a more liberal liability standard should the break-up of the Karina T have occurred on the high seas.

"Privity, like knowledge," the Supreme Court has declared, "turns on the facts of particular cases." *Coryell* v. *Phipps*, 317 U. S. 406, 411. The key to this difficult determination generally resolves itself about the exercise of due diligence to furnish a seaworthy craft. Gilmore and Black, *supra*, at §10-20. 46 U. S. C. 183(e) further provides:

> "In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

In *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, Justice Stewart considers in depth the history and scope of the doctrine of seaworthiness. While he concludes that present law yields "a complete divorcement of unseaworthiness liability from concepts of negligence," he notes also that the owner is not obligated to the extent of providing "an accident-free ship":

> ". . . The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suited for her intended service. [Citing case.]" *Id.* at 550.

Although negligence and unseaworthiness may in theory demand separate consideration, a commingling of the two

doctrines of liability seems inevitable. See generally, Gilmore and Black, *supra,* §§6-34, 6-37, 6-39. Such confusion is readily apparent in the very definition of "privity and knowledge," above, which expressly refers to a *seaworthy* vessel.

Regarding the issue of burden of proof, it is clear that in a Jones Act or related negligence proceeding the claimant bears at least the burden of going forward. Thus, he must demonstrate initially the essential elements of a negligence action, *viz*: defendant's violation of a duty and the causal relationship of that violation to injury. *The S. S. Hewitt,* 284 Fed. 911; *The 84-H,* 296 Fed. 427; Gilmore and Black, *supra,* §6-36. In a limitation action, however, the shipowner-petitioner is charged with the burden of establishing an absence of privity or knowledge. *Coryell* v. *Phipps,* 317 U. S. 406, 409-10.

On the facts at bar, presented and discussed at great length in this opinion, we find no need to reach conclusions as to the precise whereabouts of the Karina T's sinking, or of the exact dimensions of the pertinent statutes and doctrines. It is our legal finding that neither the owner nor any of its agents or employees were negligent or acted negligently before and during the voyage in question. We find also that as a matter of law the Karina T was at all times, before and during the storm, a seaworthy vessel. In our judgment, furthermore, the "Great Atlantic Coast Storm" of March 1962 was the sole and proximate cause of the destruction of the F. V. Karina T.

Thus, on the proofs, petitioner has adequately sustained the burdens of non-negligence entitling it to exoneration from all fault. *A fortiori* regarding the above findings, the petition for limitation—although moot—is also fully supported.

A form of order should be submitted.

DECREE OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Same Heading

A verified libel and petition having been filed in this Court by the above named petftioner on the 7th day of September 1962 praying for exemption from and limitation of liability in respect to any claims arising out of the loss of the Fishing Vessel KARINA T in March 1962;

And the said petition having alleged that the petitioner's interest in the vessel was nil and that there was no pending freight or salvage;

And an order having been duly entered on September 10th, 1962, thereafter amended by order entered September 17th, 1962 directing a monition to issue under the seal of this Court against all persons claiming damages arising from or growing out of the said loss of the Fishing Vessel KARINA T, citing them to appear before this Court and make due proof of their respective claims under oath and file the same with the Clerk of this Court on or before the 5th day of November, 1962;

And public notice of said monition having been duly given, as required by law and the practice of this Court;

And upon the return of said monition proclamation having been duly made for all persons claiming damages aforesaid to appear and answer the libel and petition and to present their claims; and claims having been presented as follows, to wit:

1. Claim of Anne Marie Jorgensen, as Administratrix of the Estate of Karl Jorgensen, Deceased, for loss and damage by reason of his death. $110,000.00

2. Claim of Bridget Barron, as Administratrix of the Estate of James Barron, Deceased, for loss and damage by reason of his death. $110,000.00

3. Claim of Edith Davidson Grodem, as Administratrix of the Estate of David Davidson Grodem, Deceased, for loss and damage by reason of his death. $110,000.00

4. Claim of Evelyn Thorne, as Administratrix of the Estate of Andrew Thorne, Deceased, for loss and damage by reason of his death. $110,000.00

5. Claim of Inga Holberg, as Administratrix Ad Prosequendum of the Estate of Rolf Holberg, Deceased, for loss and damage by reason of his death. $110,000.00

6. Claim of Josephine McGhie, as Administratrix Ad Prosequendum of the Estate of John McGhie, Deceased, for loss and damage by reason of his death. $110,000.00

And no other person having presented any claim; and the said claimants above named having answered the said libel and petition; and the cause having duly come on for trial on the pleadings and proofs of the petitioner and of the said claimants, and Parsons, Canzona, Blair & Warren, Esqs., and Mahar & Mason, Esqs., by Frank C. Mason, Esq., having appeared on behalf of the petitioner and Herbert J. Kenarik, Esq. and George J. Engelman, Esq. having appeared on behalf of the claimants, and the cause having been argued and submitted by proctors for the respective parties, and due deliberation having been had, and the Court having rendered its decision and having made findings of fact and conclusions of law, pursuant to Supreme Court Admiralty Rule 46½, holding that the loss and damages arising from the total loss of the Fishing Vessel KARINA T were not caused by any negligence or design of the petitioner or those in charge of its said vessel, or with its privity or knowledge;

Now on motion of Parsons, Canzona, Blair & Warren and Mahar & Mason, proctors for petitioner, it is

ORDERED, ADJUDGED and DECREED:

1. That the losses described in the libel and petition and the claims of the claimants were not caused by the design or neglect of the petitioner, Karina T Corporation, and did not occur with the privity or knowledge of the said petitioner.

2. That the petitioner hereby is forever exonerated, exempted and discharged for all claims for loss, damages or injuries arising from or growing out of the loss of the Fishing Vessel KARINA T in March 1962.

3. That this decree of exoneration and limitation of liability is without costs.

ARTHUR S. LANE
U. S. D. J.

Dated at Trenton, New Jersey

December 31st, 1964

Appendix A—Opinions, Decree and Judgment

OPINION

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15371

In The Matter Of The Petition Of KARINA T. CORPORATION As Owner Of The Fishing Vessel KARINA T. In A Cause Of Exoneration From And Limitation Of Liability

BRIDGET BARRON, As Administratrix Of The Goods, Chattels And Credits Of JAMES BARRON, Deceased; EDITH DAVIDSON GRODEM, As Administratrix Of The Goods, Chattels and Credits Of DAVID DAVIDSON GRODEM, Deceased; INGA HOLBERT, As Administratrix Ad Prosequendum Of The Estate Of ROLF HOLBERG, Deceased; ANNE MARIE JORGENSEN As Administratrix Of The Goods, Chattels And Credits Of KARL JORGENSEN, Deceased; JOSEPHINE MCGHIE, As Administratrix Ad Prosequendum Of The Estate of JOHN MCGHIE, Deceased; EVELYN THORNE, As Administratrix Of The Goods, Chattels And Credits Of ANDREW THORNE, Deceased—Claimants,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 10, 1965

Before KALODNER, Chief Judge and STALEY and FORMAN, Circuit Judges

OPINION OF THE COURT

Filed January 4, 1966

Per Curiam:

In the instant case the District Court found that the losses described in the libel and petition were not caused by the design or neglect of the petitioner, Karina T. Corporation, and that they did not occur with the privity or knowledge of the said petitioner.

On view of the record we cannot say that it did not sustain the District Court's findings.

For the reasons stated the Decree of exoneration will be affirmed.

JUDGMENT OF THE COURT OF APPEALS

Same Heading

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: KALODNER, *Chief Judge,* and STALEY and FORMAN, *Circuit Judges.*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the Decree of the District Court, filed December 31, 1964, be, and the same is hereby affirmed; each party to bear its own costs.

ATTEST:

IDA O. CRESKOFF
Clerk

January 25, 1966

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Appendix B—Text of Statutes Involved

Limitation of Vessel Owner's Liability

46 USC 183 Amount of liability; loss of life or bodily injury; privity imputed to owner; 'seagoing vessel'

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 USC 185 Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, and the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title.

Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R. S. §4285; June 5, 1936, c. 521, §3, 49 Stat. 1480.

PERTINENT TEXT OF SUPREME COURT ADMIRALTY RULE 51

Rule 51. Limitation of liability—how claimed

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled 'An Act to limit the liability of shipowners and for other purposes' (Sections 183 to 189 of Title 46 of the U. S. Code, 46 U. S. C. A. §§183-189) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termmination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court

whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six per-cent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance

with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

* * *

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding. Amended June 21, 1948.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1108

In the Matter of the Petition of KARINA T. CORPORATION as Owner of the Fishing Vessel *KARINA T.* in a Cause of Exoneration From and Limitation of Liability

BRIDGET BARRON, etc., et al.,

Claimants-Petitioners,

v.

KARINA T. CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANK C. MASON,
70 Pine Street,
New York, N. Y. 10005
Attorney for Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Question Presented

Where substantial evidence established that a seven year old fishing vessel was lost in an unprecedented storm, that she had a long record of staunchness, stability, sound construction and careful maintenance, and that the remnants of her wreck were worthless, will this Court review and reject, as clearly erroneous, the Trial Court's findings of fact grounded on such proofs?

Statement of the Case

At 6:00 A. M. March 6th, 1962, while the Fishing Vessel *Karina T* was fishing off the Jersey Coast, her master radio-telephoned respondent's president, at his home, reporting a storm of great intensity with winds of seventy miles an hour from the northeast and rough seas. He said that the vessel was performing ably, that she was "lying just like a duck in the water" and taking no water although the weather was "very rough" [b 72, 85]*.

The Weather Bureau prediction was that the winds would change to northwest and diminish on the evening of March 6th [P. Ex. 1, pp. 11, 12]. In view of this report the master stated his decision to the owner's president to await the weather change and then proceed into Point Pleasant, New Jersey, his original departure point. He intended to arrive on the morning of March 7th [b 72-85]. That was the only communication between the master and respondent.

The wind direction and force did not change as predicted. It increased in great violence and blew from the northeast during the next sixty hours [b 34]. Further efforts by the owner to reach her were unsuccessful during the three day storm. Two other fishing vessels at sea were in radio-telephone contact with her on March 6th and 7th. During those conversations neither her master nor others aboard her, said or gave any indication that she was experiencing any difficulty about her hull, engine or appurtenances. She, like the other fishing vessels, was being driven by the northeast gales and tidal current in a southwesterly direction during March 7th [b 27-31, 104]. Fruitless measures were taken by her owner and the Coast Guard, both with air and sea craft, to locate her. On or about March 22nd

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* Numerals followed by "b" refer to Appellee's Appendix in the Court of Appeals, filed herein.

the Coast Guard found the remains of her wrecked pilot house on the beach of Assateague Island off the Virginia Coast, a distance of about one hundred twenty miles southwest of Barnegat Light Ship where she was last spoken by the other fishing craft [P. Ex. 8].

Assateague Island was covered with water by the storm [a 19]*. The northeast gales blew all vessels southwesterly. The coastal area between Barnegat and Assateague is heavily shoaled [b 34, 35]. Petitioners' own witness testified "it's a graveyard of ships; there is no question about that. And a storm of that magnitude would be very rough and unpleasant and an unhealthy place to be" [b 150].

The snapshots of the wreckage remains are stark evidence of the storm's destructive force against a vessel in the shoals, and that those remains were, beyond question, worthless [5a, 6a, 8, 9].

The uncontradicted testimony of an experienced fishing master was that the wreck parts had no value whatsoever [b 22].

Two striking portions of the testimony relating to the storm are mentioned in the Trial Court's opinion, one by respondent's witness, Hansen, and the other by petitioners' witness, Biktjorn [17a, 19a, App. to Petition]. Hansen said that the wind surpassed 100 miles per hour, that it was the worst storm in his 50 years' experience [b 32-34, 106]. Biktjorn's vessel was bound into New York but wound up in Portsmouth, Virginia. For three days he said "we were going up against the wind and going backwards" [b 152]. Both vessels were damaged. They were larger than the *Karina T* [b 24, 152].

After a six day trial, with 1000 pages of testimony and 74 exhibits, the Trial Judge, who was long experienced in

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* Numerals followed by "a" refer to Appellants' Appendix in the Court of Appeals, filed herein.

deep sea navigation [b 150], conscientiously evaluated the evidence, as his opinion shows, and made careful findings which are now again under attack. But no evidence is pointed to in the futile claim that they are clearly erroneous.

Reasons for Denial of the Writ

1. The Court of Appeals heeded this Courts' instruction in *McAllister* v. *United States*, 348 U. S. 19, 75 S. Ct. 6, for it wrote that it could not say that the trial record did not sustain the District Court's findings requiring exoneration. [Appendix to Petition, 31a.] The petition here is replete with fact references and arguments. The meringue of law throughout it does not conceal the design to have this Court review *de novo* a fact situation, precisely what the mandate of *McAllister* was directed against.

2. Numerous misstatements of evidence are made in the unwarranted attack upon the findings:

The petition charges negligence on the master in failing to head for New York on that morning of March 6th, and it is said that respondent was in privity to the alleged fault. This rests on the bald statement that Tobiasen, respondent's president, ran the operation of the *Karina T*, was in control of her movements by radio-telephone and ordered her into Point Pleasant [Petition, p. 10]. These statements are not supported anywhere in the record. The District Court reviewed Tobiasen's testimony in its opinion:

> "Tobiasen stated that Manasquan Inlet in a northeast storm is a very difficult channel to enter and that he did not tell Captain Jorgensen what to do or where to make port as he had full confidence in the captain's ability as a commanding officer and he felt that Jorgensen knew the conditions and could better judge the situation" [App. to Petition, pp. 9a, 10a].

Tobiasen testified in his simple manner:

> "I had nothing to do with it. He was the captain • • • he knew more than I do about it" [a 170].

He could not control the vessel's movements by radiotelephone for he talked only once to Jorgensen at 6:00 A. M. March 6th and never thereafter [b 74].

The record references, at page 10 of the petition, to the claim that Tobiasen ordered the vessel into Point Pleasant do not support the statement at all. Those points in the record [a 123-125, 168] relate solely to a description of methods of marketing fish at New York and Point Pleasant.

Space does not permit a review of other numerous inaccuracies in the petition on the subjects of the vessel's construction and alleged unseaworthiness. Record references in the petition are to testimony of petitioners witness, Tiedemann, who was offered as an expert. He was shown to be thoroughly unqualified and the District Judge noted this in his opinion [App. to Petition, 20 a].

Of the many scattergun charges of unseaworthiness, one of prime example relates to the afterhouse [Petition, p. 7]. It is said that the afterhouse "was added after the pilot house was built", that it "was torn from its deck plate for it was not properly joined or integrated with the pilot house", and that it was "vulnerable".

In his opinion the Trial Judge set forth at length testimony that the pilot house and afterhouse were of an integral construction, that the afterhouse was secured with four tie rods on each side and one in the middle of the stern, that these rods started at the top of the afterhouse and went underneath the cross beams and were further secured with bolts that went through the deck and into and through the timbers and that these bolts were secured with washers and nuts at the bottom of the timbers; that the

pilot house was secured in pretty much the same manner, with tie rods fastened to the trunk, three in front and three in back [App. to Petition, 8a, 10a, 11a, 14a, 15a, 17a]. The testimony supported this statement [b 9, 23, 44, 45, 48, 49, 62, 64, 77, 78, 85]. (Photographs taken during the building of the vessel destroyed Tiedeman's testimony [b 148, P. Exs. 27, 28].) Petitioners' problem is that the Court accepted testimony of expert and fact witnesses, all of whom saw and examined the structures, and it rejected testimony of an unqualified "expert" who gave his opinion solely from the snapshots of the wrecked pilot house [Cl's. Exs. 7, 8, b 132, 136].

This subject is extended here to show how unreliable are the statements of facts in the petition at page 7. The other "facts" in the petition are equally misleading and it would serve no useful purpose to review them *seriatim*.

3. The subject of the wreck is overplayed in the petition for it is plain from the views of the remains of the house, lying awash on an oceanswept island off Virginia that it was worthless. It was clearly not susceptible of easy removal and preservation, as petitioners contend should have been done. They complain that no measurements were taken nor survey held. Both Carl Tobiasen and his son went to Assateague, under distressing conditions, to identify the wreck of the *Karina T.* Certainly they had no cause to conceal anything, nor did they have reason to believe that some day months later some attorney would raise unfounded questions as to their alleged failure to preserve what remained of the vessel they once prized so highly. All of the arguments in the petition are hindsight and thin.

The petition twice charges that Tobiasen swore falsely in his affidavit that there was no value to be surrendered—that "there was no salvage resulting" [Pet. pp. 3, 5]. Like the others, this wild charge is intended to arouse interest in a groundless application. The petition was filed,

on September 10th, 1962, with "Petitioner's Affidavit Of No Value to be Surrendered". Both stated that the vessel was a total loss and that there was no salvage resulting, "Wherefore her value for limitation purposes was nil" [a 277, 278]. And so the petitioner prayed that its liability, if any, should be limited to its interest in the vessel "which is nil" [a 5].

Since, as the proof showed, the remnants had no value whatsoever, and the Trial Court has so found, that settles the question [b 22, App. to Petition 23 a]. For it is obvious that while ordinarily a stipulation for "value" would accompany the limitation petition, if there is no value in existence, there is none to be surrendered. Further, the word "salvage" carres with it the meaning that something of value or monetary worth is capable of recovery. The cost might well exceed the wreck's value where it lies so that there would be "no value resulting". Here were a few battered timbers in the surf on the island off the coast, unworthy of the term "value" even where they were lying. We submit that, on the record, petitioners do Captain Tobiasen a grave injustice in charging him with perjury.

The Trial Court said of him and his witnesses: "I think the men are very solid, fine, simple, excellent people • • •. These Scandinavian witnesses that we have had, I have had a good deal of respect for their integrity, I'll tell you that. They are fine honest people. They do their best with the truth. I am convinced of that. I wish the rest of us did as well". Counsel for the present petitioners said that he "wholeheartedly agreed" with the Court's statement [b 86, 88]. Adversity has apparently changed his views.

4. The decisions below rest on the peculiar facts of this case so that a review of the findings and proofs would not be of general interest, as the petition states. No conflict of authorities is put forward as a reason for granting the writ. Even assuming that some interesting law points are

raised, which is doubtful, we respectfully suggest that they might be more deserving of this Court's attention where the factual picture is less confused than that presented by the present petition.

CONCLUSION

For the reasons stated a writ of certiorari should be denied.

Respectfully submitted,

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Attorny for Respondent.